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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 United States of America,

11 Plaintiff,

12 vs.

13 Jose De Jesus Moreno-Preciado,

14 Defendant.
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No. CR 19-2498-TUC-CKJ

ORDER

16 Pending before the Court is Defendant's Motion to Reduce Sentence Pursuant to 18
17 U.S.C. § 3582(c)(1)(A)(i) (Compassionate Release Due to COVID-19 and Ineffective Medical
18 Care) (Doc. 53) filed by Jose De Jesus Moreno-Preciado ("Moreno-Preciado"). The
19 government has filed a response (Doc. 59) and Moreno-Preciado has filed a reply (Doc. 60).

20
21 *Background*

22 Moreno-Preciado pleaded guilty pursuant to a plea agreement to one count, Importation
23 of Methamphetamine. This offense involved 18.47 kilograms of methamphetamine concealed
24 in a vehicle driven by Moreno-Preciado as he sought to enter the United States. The plea
25 agreement provided for a stipulated sentence of 41-51 months, which is the advisory guideline
26 range when taking into account minor role and acceptance of responsibility, along with the safety
27 valve credit. This sentence was below the 10-year mandatory minimum sentence although
28 Moreno-Preciado did not comply with safety-valve obligations. Moreno-Preciado asserts he did

1 not talk about the offense because he feared for his safety and the safety of his children.

2 At the time of the sentencing, the Court was aware of the risk of COVID-19 and that
3 Moreno-Preciado suffered from a rash. Additionally, the Court considered counsel's argument
4 that the agreed upon range was disparate from sentences received by other persons who
5 committed similar offenses. The Court departed downward from the calculated guideline range
6 of 78-97 months imprisonment pursuant to the plea agreement and sentenced Moreno-Preciado
7 to a 45 month term of imprisonment to be followed by three years of supervised release.

8 Moreno-Preciado has been serving his sentence at CCA because people are not being sent
9 to the Bureau of Prisons (BOP) due to the threat of COVID-19 and overcrowding. Moreno-
10 Preciado is 37 years old and obese. He has served approximately one-third of his sentence and
11 has an anticipated release date of November 6, 2022.

12 Moreno-Preciado requests compassionate release and a reduction in his sentence due to
13 inadequate medical care and the ongoing risk of COVID-19. He argues that he can be successful
14 without his further incarceration which overtaxes BOP resources. As a first time offender,
15 Moreno-Preciado asserts he has learned a hard lesson and that he will not recidivate.

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17 *First Step Act*

18 The First Step Act went into effect on December 21, 2018. See First Step Act of 2018,
19 Pub. L. No. 115-391, 132 Stat. 5194. Prior to the passage of the First Step Act, only the
20 Director of the BOP could file a motion for compassionate release. Section 603(b) of the
21 First Step Act modified 18 U.S.C. § 3582(c)(1)(A) with the intent of "increasing the use and
22 transparency of compassionate release." Pub. L. No. 115-391, 132 Stat. 5194, at *5239
23 (capitalization omitted). That section now provides that a sentencing court may modify a
24 sentence either upon a motion of the Director of the BOP "or upon motion of the defendant
25 after [he] has fully exhausted all administrative rights to appeal a failure of the [BOP] to
26 bring a motion on [his] behalf or the lapse of 30 days from the receipt of such a request by
27 the warden of the defendant's facility . . . " 18 U.S.C. § 3582(c)(1)(A).

1 The Act provides that a sentence may be reduced for “extraordinary and compelling
 2 reasons.” Additionally, district courts are granted broad discretion in determining whether
 3 to grant relief. *US v. Parker*, No. 2:98-CR-00749-CAS-1, 2020 WL 2572525, at *4 (C.D.
 4 Cal. May 21, 2020), *citation omitted*.

5 6 *Compassionate Release*

7 Moreno-Preciado asserts that, while incarcerated, he is not receiving adequate medical
 8 care: treatment for his rash has been adversely affected by the pandemic because appointments
 9 and treatments have been delayed and denied. Further, although he had been referred by an
 10 attending doctor for a re-evaluation by a dermatologist a non-attending corporate doctor denied
 11 that request because Moreno-Preciado is housed in a short term facility. Moreno-Preciado
 12 asserts he cannot follow CDC guidelines regarding COVID-19 while incarcerated. He further
 13 asserts he has increased risk from COVID-19 because of his obesity. Moreno-Preciado points
 14 out that “[o]bese people ‘who contracted SARSCoV-2 were 113% more likely than people of
 15 healthy weight to land in the hospital, 74% more likely to be admitted to an ICU, and 48% more
 16 likely to die.’” Motion, p. 11, *citing* [https://www.sciencemag.org/news/2020/09/why-covid-19](https://www.sciencemag.org/news/2020/09/why-covid-19-more-deadly-people-obesity-even-if-theyre-young)
 17 [-more-deadly-people-obesity-even-if-theyre-young](https://www.sciencemag.org/news/2020/09/why-covid-19-more-deadly-people-obesity-even-if-theyre-young). An obese person is also more like to spread
 18 the virus to others. *Id.* At 12, *citing* [https://www.hackensackmeridianhealth.org/HealthU/2020/](https://www.hackensackmeridianhealth.org/HealthU/2020/09/02/what-to-know-aboutobesity-and-covid-19/)
 19 [09/02/what-to-know-aboutobesity-and-covid-19/](https://www.hackensackmeridianhealth.org/HealthU/2020/09/02/what-to-know-aboutobesity-and-covid-19/). Further, Moreno-Precido asserts BOP has
 20 failed to implement adequate protocols in light of the pandemic (e.g., inadequate testing,
 21 isolation, personal protection equipment). The parties disagree whether Florence - CAFCC,
 22 where Moreno-Preciado is currently housed, has adequately responded to the risk of COVID-
 23 19. The Application Notes of the U.S. Sentencing Guidelines § 1B1.13 provides, in
 24 relevant part, that extraordinary and compelling reasons exist if:

25 (A) Medical Condition of the Defendant.--

26 (I) The defendant is suffering from a terminal illness (i.e., a serious and
 27 advanced illness with an end of life trajectory). A specific prognosis of life
 28 expectancy (i.e., a probability of death within a specific time period) is not
 required. Examples include metastatic solid-tumor cancer, amyotrophic lateral

sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is--

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

* * * * *

U.S.S.G. 1B1.13, App. Notes.

In exercising discretion under § 3553(a) and the First Step Act, compassionate release “due to medical conditions” is generally treated as “a rare event.” *White v. United States*, 378 F.Supp.3d 784, 787 (W.D. Mo. May 9, 2019); *see also United States v. Clark*, 2019 WL 1052020 (W.D.N.C. Mar. 5, 2019) (denying relief, which is “extraordinary”); *United States v. Gutierrez*, 2019 WL 1472320, at *2 (D.N.M. Apr. 3, 2019) (same); *United States v. Casey*, No. 1:06CR00071, 2019 WL 1987311, at *1 (W.D. Va. May 6, 2019) (same). Prisoners typically only obtain relief after serving a significant term of incarceration. *See, e.g., United States v. McGraw*, 2019 WL 2059488, at *5 (S.D. Ind. May 9, 2019) (granting the motion and noting defendant already served “nearly 17 years, a significant sanction”).

The Court considers that obesity as a “medical condition[does] not rise to the level of terminal illness or substantially diminish [Moreno-Preciado’s] ability to provide self-care from within [the facility]” *United States v. Wilfred*, 2020 WL 4365531, at *4 (E.D. La. July 30, 2020). Further, there is no basis to conclude that Moreno-Preciado is not receiving adequate care for this condition. The government agrees Moreno-Preciado’s obesity may put him at increased risk of severe illness should he contract COVID-19, but points out that Moreno-Preciado fails to identify any other particular risk factor for contracting COVID-19 or health condition warranting compassionate release. The Court does not find that Moreno-Preciado’s rash, and the treatment regarding it, qualifies as an extraordinary and

1 compelling reason warranting compassionate release. The Court agrees with the government
 2 that Moreno-Preciado's obesity may "qualify as an extraordinary and compelling reason
 3 under the application note." Response, Doc. 59, p. 7. However, as stated by another district
 4 court:

5 This Court is reluctant to find extraordinary and compelling circumstances warranting
 6 the release of inmates where the CDC's guidelines reflect only a possible heightened
 7 risk of severe illness from COVID-19, particularly where the condition at issue is one
 8 experienced by almost three quarters of the United States population over age twenty.
 9 See <https://www.cdc.gov/nchs/fastats/obesity-overweight.htm> (indicating that 71.6%
 10 of adults aged 20 and over in the United States are overweight).

11 *United States v. Pearson*, 2020 WL 7706618, at *3 (E.D. Mich. Dec. 29, 2020); *Wilfred*,
 12 2020 WL 4365531, at *5 (relief denied to inmate with BMI of 38.4; "courts have found that
 13 obesity—alone or paired with hypertension—does not provide adequate grounds for
 14 compassionate release.").

15 Additionally, the requirement that the reduction is consistent with Sentencing
 16 Commission policy focuses on community safety. The Guidelines provide that
 17 compassionate release is appropriate only where the "defendant is not a danger to the safety
 18 of any other person or to the community." U.S.S.G. § 1B1.13(2). Factors to consider include
 19 the nature of the offense, the history and characteristics of the defendant, and the nature of
 20 the danger. *Id.*; see also 18 U.S.C. § 3142(g) factors. While the Court does not disagree with
 21 the government that Moreno-Preciado may be susceptible to continued participation in drug
 22 trafficking, the Court does not find Moreno-Preciado is a significant danger to any other
 23 person or to the community. See U.S.S.G. § 1B1.13(2), 18 U.S.C. § 3142(g). The instant
 24 offense was Moreno-Preciado's first offense, he played a minor role in the offense, he
 25 accepted responsibility for his conduct, and he is not addicted to drugs or alcohol.

26 The Court also considers the § 3553(a) factors in considering whether compassionate
 27 release is warranted. This offense did involve a significant amount of methamphetamine and
 28 Moreno-Preciado did not meet the safety valve requirements. The sentence received by
 Moreno-Preciado reflected the seriousness of the offense, promoted respect for the law,
 provided just punishment, and acts to deter criminal conduct. Reducing the sentence at this

1 time would defeat those goals. The Court finds this significant because Moreno-Preciado
 2 has already received the benefit of a safety-valve reduction without meeting the safety valve
 3 requirements. Additionally, the Court considers that it was aware of both Moreno-Preciado's
 4 rash and the risk of COVID-19 when Moreno-Preciado was originally sentenced.

5 Moreno-Preciado asserts his sentence is significantly higher and disparate from others
 6 in this District despite similar crimes and histories. Moreno-Preciado similarly presented this
 7 argument at sentencing. Moreno-Preciado further states the guidelines overstate his culpability.
 8 He also points out that he has served more of his sentence (38%) than other defendants who have
 9 had their sentences reduced to time served. *See e.g., United States v. Shehee*, 2020 WL 5229030,
 10 at *3 (E.D. Wash. Sept. 1, 2020) (defendant had served just 9 months of a 70 month sentence
 11 (13%) when he was ordered released); *United States v. Locke*, 2020 WL 3101016 (W.D. Wash.
 12 June 11, 2020) (defendant served 6 months of 62-month sentence (10%)); *United States v.*
 13 *Gonzalez*, 2020 WL 1536155 (E.D. Wash. March 31, 2020) (defendant served 1 month of
 14 10-month sentence (10%)); *United States v. Ben-Yhwh*, 2020 WL 1874125, at *2, *6 (D. Haw.
 15 Apr. 13, 2020) (defendant served 8 months of a 60 month sentence (13%), when he was ordered
 16 released; *United States v. Barber*, 2020 WL 2404679, at *1 (D. Or. May 12, 2020) (defendant
 17 had served just 8.5 months of a 60 month mandatory minimum sentence (14%) when he was
 18 ordered released); *United States v. Torres*, 2020 WL 4019038, at *1, *4 (S.D. Fla., July 14,
 19 2020) (defendant had served only 5 months of a 24 month sentence (21%) when he was ordered
 20 released). Although Moreno-Preciado argues his sentence is disparate to similar cases and
 21 cites to a number of cases, he does not take into consideration that some of those defendants
 22 met the safety valve requirements. *See e.g. United States v. Aguilar-Rivera*, 4:19-cr-2305-
 23 RM-JR, *United States v. Duarte-Burgos*, 4:19-cr-1828-JAS-BGM.

24 A "specific showing that compassionate release is warranted in this case," *United*
 25 *States v. Eberhart*, 448 F. Supp. 3d 1086, 1088 (N.D. Cal. 2020), has not been made. *See*
 26 *also United States v. Van Cleave*, No. CR03-247-RSL, 2020 WL 2800769, at *7, n. 4 (W.D.
 27 Wash. May 29, 2020) (consideration of "extraordinary and compelling circumstances" in
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1 compassionate release motions are fact-intensive and dependent on the specific
2 circumstances that a moving defendant faces); *United States v. Hall*, No. 2:09-CR-
3 00116-RHW-1, 2020 WL 5016929 (E.D. Wash. Aug. 18, 2020) (compassionate release
4 motions amid the COVID-19 pandemic require a fact-intensive inquiry, taking into account
5 the unique circumstances of each individual defendant).

6 The Court finds the § 3553(a) factors weigh against a compassionate release.
7 Moreover, extraordinary and compelling reasons warranting a reduction in sentence has not
8 been shown. Although Moreno-Preciado is obese, this condition does not substantially
9 diminish his ability to provide self-care within the environment of a correctional facility. His
10 circumstances are, in the present pandemic, far closer to ordinary for a person of his age than
11 extraordinary. The Court finds Moreno-Preciado's circumstances do not justify the rare
12 event of granting compassionate release. In its discretion, the Court will deny Moreno-
13 Preciado's request.

14 Accordingly, IT IS ORDERED Motion to Reduce Sentence Pursuant to 18 U.S.C. §
15 3582(c)(1)(A)(i) (Compassionate Release Due to COVID-19 and Ineffective Medical Care)
16 (Doc. 53) is DENIED.

17 DATED this 19th day of February, 2021.

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20 Cindy K. Jorgenson
21 United States District Judge
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